IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 13TH MARCH 2007 / 22ND PHALGUNA 1928

CRL.A.No. 1208 of 2006()

SC.109/2002 of ADDL. SESSIONS COURT (ADHOC-III), THALASSERY
CP NO.35/2001 OF JUDL. MAGISTRATE OF FIRST CLASS COURT -II, KANNUR.

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APPELLANT/ACCUSED:

RAVEENDRAN, S/O. KRISHNAN,
CHENICHERY HOUSE, CHOONDA, KANNAPURAM,
KANNUR DISTRICT.

BY ADV. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENTS/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR, SRI.THOMAS JOHN AMBOOKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13/03/2007, THE COURT ON 13/03/2007 DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

Crl. A. No.1208 of 2006

Dated this the 13th day of March, 2007

JUDGMENT

The appellant faced trial for the offence punishable under Section 55 (a) of Abkari Act. The prosecution case against the appellant is that while he was working as a Railway Guard he was found in possession of 1500 packets of Karnataka made arrack on 24.7.2000 at about 10.15 PM without any licence or proper permit under the provisions of the Abkari Act. To prove the case against the appellant, prosecution examined PWs.1 to 6 and relied on Exts.P1 to P11. MOs. 1 to 3 were also produced by the prosecution. On completion of prosecution evidence, the appellant was questioned under Section 313 of the Code of Criminal Procedure. He denied the allegation levelled against him and pleaded that he is innocent. However relying on the evidence adduced by the prosecution, the trial court found the appellant guilty of the charge and he was convicted under Section 55 (a) of the Abkari Act and sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs.1,00,000/- and in default to undergo a further period of rigorous imprisonment for 6 months. The benefit under Section 428 of Code of Criminal Procedure was also allowed to the appellant. The judgment of the trial court is assailed in this appeal.

2. This Court heard the learned counsel, Sri.P.Vijaya Bhanu,

appearing for the appellant as well as the learned Public Prosecutor. Sri.P.Vijaya Bhanu had raised four contentions before this Court. Firstly, it is contended that the trial court committed serious error in placing reliance on the evidence adduced by the prosecution to find the appellant guilty of the charge, as the evidence adduced by the prosecution is not sufficient to prove the case against the appellant beyond reasonable doubt . Secondly, it is contended that the prosecution failed to prove that the appellant was in conscious possession of the contraband article alleged to have been seized from the dog box of the Guard room of the train, as there was no evidence adduced by the prosecution to prove that the guard room was in exclusive occupation of the appellant. Thirdly, it is contended that the detecting officer had not complied with the provisions of Section 36 and Section 53 of the Abkari Act and the provisions of the Kerala Excise Manual while seizing, the contraband article, taking the sample, labelling and sealing the same in the presence of independent witnesses. Fourthly, it is contended that the contents of the report of the Chemical Analyst had not been put to the appellant while he was examined under Section 313 of the Code of Criminal Procedure which prejudiced him to know the result of the Public Analyst as the contraband article seized was arrack.

3. The question to be decided in this appeal, in the light of the contentions and in the light of the evidence adduced by the prosecution, is whether the prosecution had succeeded in proving the case against the appellant beyond reasonable doubt or not.

4. The prosecution case is as follows:-

The appellant was working as the Guard of the passenger train No.

530, which started from Mangalore to Cheruvathur at about 9.10 PM on 24-7-2000. When the train reached at Kasargod Railway station at about 10.15 PM, on receiving the reliable information that Karnataka made arrack is being transported in the cabin of the guard of the train, PW6-Sub Inspector of Police, Railway Police Station, Kasargod and PW1- the Head Constable of that Police Station entered into the guard bogie of the train and inspected the dog box of the guard bogie. They found 3 plastic sacks and a card board box containing 375 packets of 100 ml each of Karnataka made arrack . The appellant was the guard of the train and he was sitting in the guard room. Immediately PW6 questioned the appellant. The appellant said that he was not aware of the packets contained in the dog box and he did not know anything about the article. PW1 and another Police constable accompanied the appellant upto Cheruvathur and when the train reached at Cheruvathur, the appellant was arrested from there on preparing Ext. P1 arrest memo and he was brought to Kasargod Railway Station. The further case of the prosecution is that PW6 seized the plastic bags and the card board box and took the sample and labelled the same in the presence of the accused as well as PW2 and PW3, the independent witnesses. Thereafter both the samples and contraband articles were taken to the Police Station and a crime was registered against the appellant. Subsequently, investigation of the case was conducted and final charge was laid before the court on the basis of Ext.P7 report of the Public Analyst.

5. To prove this case, the prosecution relied on the evidence of PW1-the Head constable, who arrested the appellant, and PW3 an independent witness who was a signatory to Ext.P2. A porter of the railway

station was examined as PW2 who turned hostile to the prosecution and PW6 was the Sub Inspector, who dictated the crime.

6. PW6, who had given evidence before the court that he had got reliable information that the Karnataka made arrack is being transported in the cabin of the guard room of the train and when the train stopped at Kasargod, he himself and PW1 entered into the cabin of the guard room and seized three plastic sacks and a card board box which contained 1500 packets of Karnataka made arrack each measured about 100 ml. This witness has further stated that the packets taken into custody from the cabin of the train were placed at the platform and in the presence of PW2 and other independent witness-PW3, who had prepared Ext.P2 Mahazar. Further this witness has stated that he had directed PW1 and other police constable to follow the appellant and to arrest him. The evidence of this witness was corroborated by the evidence of PW1. Though the prosecution examined PW2 regarding the seizure of the contraband articles, taking samples, labeling and sealing the same, this witness turned hostile to the prosecution as he had stated that he had not seen the seizure as alleged by the prosecution. PW3 is an independent witness, who was present at the Railway station, to receive one of the relatives who arrived by that train. PW4 is the Engine Driver of the train during the relevant time, who had stated that the appellant was the guard of the train during the relevant time. PW5 is the constable who had examined to prove that the Mail/Express Guard Rooster has been seized by PW6. The evidence of these witnesses have been accepted by the trial court and found that the prosecution has proved the charge against the appellant. But it is to be seen that when

PW6 was cross examined by the defence, this witness has not revealed the source of information that the contraband article is being carried in the room of the guard and this witness has not conducted any investigation regarding the source of the article transported or loaded to the train on the fateful day. In the same manner this witness has not conducted any investigation regarding the point to which the contraband article is transported. Further this witness has not stated before the court that he fully knew about the information that the appellant was responsible for the transporting of the contraband article in the cabin. The prosecution case against the appellant was that he was found in possession or in transporting the contraband article in the dog box of the train with the knowledge that there was no permit or licence under the provisions of the Abkari Act. In the above circumstances, it is the duty of the investigating officer to prove that the appellant was responsible for the loading or transporting of the contraband article in the guard room and too in the dog box. In this context it is to be seen that the prosecution also has not proved that the guard room was in the exclusive occupation of the appellant from the starting point to station at which the contraband article was seized. Further it has come out in evidence that the train started from Bangalore to Kasargod on at about 9.15 PM and it reached at 10.15 PM and there was no evidence to show that from where the contraband article is loaded or transported to cabin of guard room and placed in the dog box. These are the matters to be proved by the prosecution to show that the appellant alone was in the cabin room of the train and anybody else entered in the cabin in between Mangalore to Kasargod or while the train was kept in the Shunting Yard/Coach Examination

Terminal. It is also not proved that it is the duty of the appellant to open the dog room or any other cabin or box in the Guard Room. According to the Railway Rules the duty cast on the guard is to see that whether the train is having break, light and is in running condition. The prosecution has also not proved that the appellant was the only guard who worked in the train on the particular day on the day of incident. In this context, the evidence of PW4, the engine driver is very relevant. PW4 had stated in the cross examination that he was not so sure that the appellant was the guard of the train during the relevant time. Further, the prosecution has not proved any document to show that the appellant was the only guard working in the train during the relevant time. In this context it is to be noted that though mail/express guard register was seized by the Police the same was not produced before the court to show that the appellant was alone working in the train during relevant time. These circumstances would create doubt regarding the conscious possession of the contraband article by the appellant. The appellant had stated even in Ext.P2 mahazar report that, he was not aware of anything about the contraband article and he was innocent in the matter.

7. The next point to be considered is that whether PW6 has complied with the provision of Abkari Act, the Kerala Excise Manual while he seized the contraband articles and taking the sample. Even if the evidence of PW1 and 6 is believed, there arises a doubt whether sample was taken in the presence of the appellant and independent witnesses . In this context the evidence of PW2 is relevant who had stated before the court that he had not seen anything seized from the appellant though he had signed Ext.P2. But as a witness his signature is not seen on the label on the contraband and the

sample. Further it could be seen that even though as per Ext.P4 property list, the contraband and the sample were seized on 24.7.2000 . These were produced before the court only on 29.7.2000. There is no evidence to show that the contraband and sample were kept in safe custody by PW6. In this regard , the evidence of PW6 assumes much relevancy as he had stated that he did not know who had produced the same before the court. According to him he had entrusted the material objects to one Unni. That Unni was not examined before the court to prove that the sample had been produced before the court as alleged by the prosecution and the same as seized from the appellant. In this context the judgment of this court reported in **Narayani v. Excise Inspector** (2002 (3) KLT 725) is relevant. In the above judgment this court has categorically held that it was the duty of the prosecution to prove that the residue and the sample were kept in the proper and safe custody till the date of producing the same before the court . In the circumstances, this court is of the view that it is not proper to conclude that the prosecution had proved the case against the appellant beyond reasonable doubt.

8. The next point to be considered in the light of the argument of learned counsel of the appellant is that when the appellant was questioned under Section 313 of the Code of Criminal Procedure, no question was put to the appellant regarding the report of the Public Analyst . This contention is based on an unreported judgment of this court in which the Honourable Chief Justice Mr.V.K.Bali in Crl. R.P. No.1031/97 considered the relevancy of the contents of the Public Analyst to be put to the accused. On this ground also the judgment of the trial court is not sustainable.

9. In the light of the discussions made in this judgment and the reason stated thereunder, this court is of the view that the judgment of the lower court is not sustainable and hence it is hereby set aside. The appellant is found not guilty of the charges levelled against him. Accordingly this appeal is allowed. Appellant is acquitted. His bail bonds shall stand cancelled. If the appellant had remitted any amount that shall be refunded to him as per law.

K.THANKAPPAN, JUDGE

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